TYE CHWEE HOON

v.

CAYMAN COMMODITIES (M) SDN. BHD. & ANOR.

HIGH COURT MALAYA, PENANG
MOHAMED DZAIDDIN J
[SUIT NO. 22-152-1988]
9 JANUARY 1989

CIVIL PROCEDURE: *Application by plaintiff for injunction to restrain the 2nd defendant from releasing the statutory deposit held by them - Application by 2nd defendant to strike out claim under O. 18 r. 19; Rules of High Court 1980 - Questions to be considered - Whether necessity to file defence where 2nd defendants files in conditional appearance and applies to strike off claim.*

COMMODITIES AND FUTURES TRADING: *Decision of Commodities Trading Commission final - Whether plaintiff could obtain an injunction against the 2nd defendant - Whether appropriate remedy.*

The plaintiff who was a client of the 1st defendant discovered that she had been cheated by them and she subsequently lodged a complaint with the Commodities Trading Commissioner under the Commodities Trading Act 1985. An enquiry was held and the plaintiff was awarded a sum of RM58,728 as compensation. She appealed to the Commodities Trading Commission against the decision in respect of the quantum of the award and alleged that she should have been awarded a sum of RM125,149.36.

Prior to the decision of the Commodities Trading Commission the plaintiff filed the writ and applied for an interlocutory injunction against the 2nd defendant restraining the latter from releasing a sum of RM125,149.36 from the statutory deposit of the 1st defendant which was held by the second defendant. The 2nd defendant entered conditional appearance and applied to strike out the plaintiff's claim under O. 18 r. 19. At the hearing the plaintiff informed the Court that her appeal to the Commission had been rejected.

Held:

[1] Where the 2nd defendant has filed in a conditional appearance and applied to strike out the writ of summons there was no need to file in a statement of defence.

[2] As the Commodities Trading Act 1985 clearly provided that the decision of the Commodities Trading Commission was final the plaintiff's action against the 2nd defendant in the present action was a re-litigation of the matter which had been finally adjudicated by the Commodities Trading Commission and accordingly there was no reasonable cause of action against the 2nd defendant and was likewise an abuse of the process of the Court and as such the writ should be struck out.

[2nd defendant's application allowed with costs.]

Cases referred to:

Ganda Oil Industries Sdn. Bhd. & 10 Ors. v. K.L. Commodity Exchange & Anor. [1988] 1 CLJ (Rep) 56

Legislation referred to:
Commodities Trading Act 1985, ss. 3, 4, 5, 9, 11, 33, 37, 38, 40, 46
Commodities Trading (Dealers, Commodity Trading Advisors and Representatives) Regulations 1980, reg. 17
Rules of the High Court 1980, O. 18 r. 19

For the plaintiff - Tye Chwee Hoon (in person)
For the 2nd defendant - Haji Sulaiman bin Abdullah; M/s. Zain & Co.

JUDGMENT

Mohamed Dzaiddin J:

There are two applications in this suit. In encl. 4, the plaintiff prays for an interim injunction against the 2nd defendant restraining the latter from releasing a sum of RM125,149.36 from the statutory deposit of the 1st defendant which is held by the 2nd defendant under the provisions of the Commodities Trading Act 1985 ("the Act") pending the final disposal of the suit or until further order. In encl. 23, the 2nd defendant applies to strike out the plaintiff's claim against him under O. 18 r. 19 Rules of the High Court 1980 on the grounds stated therein.

At the outset of the hearing of this application on 21 November 1988, the plaintiff, who conducted the proceedings in person, raised a preliminary objection against the 2nd defendant's application (encl. 23). The grounds of her objection are stated in a written note which was prepared with the assistance of some lawyers, who were her former students. First, she stated that the conditional appearance of the 2nd defendant to her writ was filed out of time in contravention of O. 3 r. 2 of the Rules of the High Court. Secondly, the 2nd defendant failed to file his defence in time which entitled her to a judgment in default under O. 19 r. 2. Thirdly, there was short service of the 2nd defendant's application in encl. 23. On these grounds, she claimed that the 2nd defendant should be precluded from defending the claim and judgment be entered against him. After hearing the reply by Haji Sulaiman Abdullah, for the 2nd defendant I overruled the plaintiff's preliminary objection on the ground that the points raised were mere technicalities curable under O. 2 r. 1 and O. 3 r. 5 of the Rules of the High Court. As for the second point of objection, there was no necessity to file the defence after filing a conditional appearance and when there is a pending action by the 2nd defendant to strike out the plaintiff's writ and the statement of claim.

Having examined both applications, I propose to deal with the 2nd defendant's application (encl. 23) first. This is an application to strike out the plaintiff's writ and statement of claim against the 2nd defendant on the grounds stated under O. 18 r. 19(1)(a), (b) and (d). There was no supporting affidavit filed by the 2nd defendant. However, Haji Sulaiman relied entirely on the plaintiff's statement of claim and he based his submissions on the relevant provisions of the Act.

In a nutshell, the plaintiff's claim against the 2nd defendant is for an order that the latter pays her the sum of RM125,149.36 being the amount equivalent to the prevailing exchange rate of Japanese yen from the statutory deposit of the 1st defendant held by the 2nd defendant under the provisions of the Act.

In order to get a clearer picture of the present dispute, let me summarise the facts of the matter as gathered from the plaintiff's affidavit (encl. 3). The plaintiff was a client and customer of the 1st defendant in some commodities futures trading of Tokyo Red Beans.

She entered into various transactions with the 1st defendant between 1984 and March 1985 and paid substantial sum of money. Later, when she discovered that she had been taken for a ride in these transactions by the 1st defendant, she quickly lodged a complaint with the Commodities Trading Commissioner established under the Act. The Commissioner conducted an enquiry into her complaint on 28 June 1985, and found that she had sustained pecuniary loss because of a default committed by the 1st defendant. In the result, the plaintiff was awarded compensation in the sum of RM58,728 to be paid from the statutory deposit kept by the 2nd defendant. She was formally informed of her right of appeal under s. 46 of the Act. So, on 30 September 1987 she sent her letter of appeal to the Commission. Looking at her letter (Exhibit TCHS in encl. 3), her only ground of appeal was on the quantum of the compensation. She claimed that as she had paid the 1st defendant a sum of equivalent of 5,872,800 Japanese yen she should be compensated the said amount at the current exchange rate, which was RM125,149.36.

In the meantime, on 26 October 1988 she filed the present writ. On the hearing of this present application on 21 November 1988, the plaintiff orally informed me that her appeal had been dismissed by the Commission.

The Law

The Act, which superceded the 1980 Act, established the Commodities Trading Commission to provide *inter alia*, for the establishment of a commodity exchange, to control the trading in commodity futures contracts. The 1st defendant was a registered dealer within the meaning of s. 33. The 2nd defendant is the person appointed under s. 9(1) and his specific powers are provided under s. 11. However, his powers and functions are not the same as those of the Commission. In the case of the Commission, which is established under s. 3(1), its functions are mainly supervisory and in particular to take reasonable measures to safeguard the interest of persons, like the plaintiff in this case, who traded in commodity futures contracts and to suppress illegal and improper practices in relation to trading in commodity futures contracts and price manipulations (s. 4). In carrying out its functions, the Commission has various powers under s. 5. Paragraph (e) to this section gives the Commission power to hear and determine any appeal which is appealable to the Commission, and under s. 46 any person aggrieved by the decision of the Commissioner under any of the matters mentioned in the section, may, within one month after he is notified of the decision, appeal to the Commission, whose decision shall be final.

The 1st defendant was registered as a dealer by the Commissioner under s. 37 upon payment of a deposit of RM750,000 in compliance with s. 38. This deposit was paid into "Futures Trading Deposits Account" administered by the Commissioner. Section 40(1)(c) provides that where the Commissioner has reason to believe that any person sustained pecuniary loss because of a default committed in the course of or in connection with commodity futures trading business of a dealer, the Commissioner may forfeit all or any part of the deposit paid under s. 38. Paragraph 3 states that the deposit or part thereof forfeited shall be applied by the Commissioner in accordance with regulations made under the Act. The Commodities Trading (Dealers, Commodity Trading Advisors and Representatives) Regulations 1980 is the relevant regulation ("Regulation"). Part III of the Regulation concerns with the procedures for the application of deposits. Regulation 17 provides that where a deposit or part of the deposit is forfeited under s. 40 of the Act, such deposit shall be applied by the Commissioner for the purpose of compensating persons who establish claims for pecuniary loss against

the dealers. Perhaps, it is worthy to mention here that under para. 3 of the reg. 17, the amount which any claimant is entitled to claim as compensation is the amount of the actual pecuniary loss suffered by him, plus reasonable costs and disbursements.

Thus, after examining the facts and relevant provisions of the law, can it now be said that the plaintiffs writ of summons and the statement of claim disclose a reasonable cause of action against the 2nd defendant or raise some questions fit to be decided by this Court? As no affidavit evidence is admissible, I need to address myself simply on the statement of claim.

The statement of claim contains 15 paras and 6 prayers. Without reciting them, I find paras. 10, 11, 12 and 13 are relevant to the 2nd defendant. In essence, they refer to the statutory deposit, the inquiry conducted by the 2nd defendant and his decision, the appeal to the Commission and finally the amount expended in Japanese yen. Based on these paragraphs, the plaintiff prays for an injunction first restraining the 2nd defendant from paying out the sum RM125,149.36 from the statutory deposit and secondly, the said sum be paid to her.

Clearly, the plaintiff's claim against the 2nd defendant and her right to the payment of compensation are derived from the provisions of the Act, the relevant sections of which I have adverted to above. At the outset, it is crucial to note that at the time of her filing the writ she had failed to exhaust her right under the Act because she filed it before the Commission had given its decision on her appeal. Evidently, the appeal had been dismissed and under s. 46 of the Act, the decision is final. In the result, she cannot proceed with the present action based on the same issues. She could, of course, resort to an application for judicial review if the decision-making process of the Commission was not exercised in a proper manner. Whether or not a judicial review is available, see *Ganda Oil Industries Sdn. Bhd. & 10 Ors. v. K.L. Commodity Exchange & Anor.* [1988] 1 CLJ (Rep) 56.

Be that as it may, upon considering the entire statement of claim, in my opinion, the plaintiff's action in this suit against the 2nd defendant is a relitigation of the matter which had already been finally adjudicated by the Commission with no right of a further appeal. In short, the plaintiff's present claim is simply over her dissatisfaction against the quantum awarded as compensation by the 2nd defendant to be paid from the statutory deposit. See para. 13 of the statement of claim where she alleged that she had expended 5,872,800 Japanese yen and she should therefore be paid the ringgit equivalent at the material time. On this issue, I find there is no merit in her claim because reg. 17(3) of the Regulation speaks of "actual pecuniary loss" suffered by the plaintiff.

> "A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleading are consider" (per Lord Pearson in *Drummond-Jackson v. British Madical Association* [1970] 1 WLR 688). Therefore, after considering the statement of claim in the context of O. 18 r. 19(1)(a) and for reasons stated above, in my judgment, the plaintiff's writ and statement of claim disclose no reasonable cause of action or raise any question fit to be tried by me.

I have also been persuaded at this stage, on the basis of the pleadings, to make a finding that the plaintiff's action is "an abuse of the process of the Court." I have earlier mentioned what her grievance in this action was. She was merely dissatisfied with the decision of the Commissioner regarding the award. Hence, in my opinion, it would be an abuse of the process of the Court to allow her to relitigate identical issues which had already been decided in her favour, yet to her dissatisfaction.

All in all, I am fully satisfied that this is a proper case where the plaintiff's writ and statement of claim should be struck out. Accordingly, I allow the 2nd defendant's application with costs.

In view of the above decision, I dismiss the plaintiff's application for an injunction against the 2nd defendant as per encl. 4. I make no order as to costs.

Also found at [1989] 2 CLJ 518